Office - Supreme Court, U.S.
FILED
NOV 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(*Counsel of Record*)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
I. THE ISSUES PRESENTED FOR REVIEW DO NOT RAISE FACTUAL QUESTIONS	1
II. THE BRIEF IN OPPOSITION MISSTATES PETITIONER'S POSITION	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Hecht v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)	6
Northeastern Tel. Co. v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)	3
Stromberg v. *California*, 283 U.S. 359 (1931)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-510

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I. The Issues Presented For Review Do Not Raise Factual Questions

Respondent Aspen Highlands Skiing Corp. ("Highlands") argues that the three questions presented for review[1]—all of which relate to the imposition by the court of appeals of a legally enforceable duty on the part of horizontal competitors to cooperate—raise fac-

---

[1] Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition" or "Pet.") i. "Pet. App." refers to the Appendix to the Petition. "Resp. Br." refers to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

tual questions, which would prevent this Court from reaching the main legal issue.[2] That is incorrect.

As the court of appeals recognized, the verdict here cannot stand if, as a matter of law, a leading firm has no duty to cooperate with an established rival to market their products jointly. The court summarized the six theories on which Highlands relied in closing argument. Pet. App. 12a. It then stated:

> Defendant challenges the first, second, fifth and sixth theories reasoning that their validity hinges on whether defendant had a duty to cooperate with plaintiff, and that as a matter of law no such duty could have existed . . . . We agree that the validity of the above four theories is premised on the theory of a duty to cooperate. And we agree that defendant has preserved the right to challenge the sufficiency of the evidence of this theory to support the verdict.

Pet. App. 14a. The court then spent nine pages considering whether petitioner Aspen Skiing Company ("Ski Co.") had a duty to cooperate with Highlands. Pet. App. 15a-23a. Although the court referred in general terms to Ski Co.'s "other conduct" (Pet. App. 15a, 23a), it nowhere analyzed that "other" conduct or suggested in any way that, by itself, it could support the verdict. There is no need for this Court to consider the other conduct: the verdict stands or falls on the existence of a duty to cooperate.

---

[2] In the court below, when Highlands was urging that the issue of the existence of a duty to cooperate could not be raised by a challenge to the sufficiency of the evidence, it contended, as the court of appeals put it, "that defendant's argument 'is largely a legal one.' " Pet. App. 13a.

It is settled law that where a jury has rendered a general verdict against a defendant and, due to the way the issues were framed for the jury, it is unclear whether the verdict was based on conduct that was unlawful or on conduct that was lawful, the verdict cannot stand. *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 94-95 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (antitrust case). *See also Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931).

Highlands cites what it contends are "a *series* of [five] exclusionary activities." Resp. Br. 13 (emphasis in original). The first four, however, are merely variations on the single theme of a duty to cooperate, and the last is of such insignificance as a matter of antitrust law that the court of appeals disregarded it.

The first "activity" is Ski Co.'s willingness to cooperate with respondent on terms respondent regards as unfair. That "activity," included as one of the six "theories" Highlands relied on below, was dealt with by both parties and also the court simply as evidence that Ski Co. did not want to reach agreement with Highlands on continued cooperation. Pet. App. 12a-14a; *see* p. 2, *supra*.

The second "exclusionary activit[y]" relied on is Ski Co.'s refusal to participate in Highlands' "Adventure Pack" scheme. The Adventure Pack was an attempt by Highlands to sell to the public, by itself, a combination of its own skiing services and Ski Co.'s. Ski Co. refused to cooperate with the plan: it refused to sell its own lift tickets to Highlands so that Highlands could re-sell them to the public unchanged but in a package with Highlands' own lift tickets, and it refused to accept coupons issued to the public by Highlands for use of

Ski Co.'s lifts. This alleged wrong is the same one complained of throughout: Ski Co.'s refusal to cooperate with Highlands in inducing the public to patronize Highlands as an adjunct to patronizing Ski Co.[3]

The third "activity" complained of—another of the "theories" dealt with below simply as evidence of unwillingness to cooperate (Pet. App. 12a-14a)—is Ski Co.'s increase in the price of its daily lift tickets; the increase made the Adventure Pack unprofitable for Highlands. Ordinarily, price *increases* are not predatory; it is *decreases* that are predatory. The usual effect of price increases is to drive patronage to one's competitors. Highlands' complaint about the price increase is merely a restatement of its theory of a duty to cooperate: that Ski Co. had a duty to cooperate by keeping its prices for lift tickets low enough so that Highlands could sell the tickets in a package that would yield a profit. The law imposes no such duty.

Fourth, Highlands contends that Ski Co. inconsistently refused to agree on a coupon system for a joint ticket with Highlands while it did agree to such

[3] Highlands argues that Ski Co.'s refusal to cooperate in the Adventure Pack makes this a vertical case because the lift tickets Highlands sought to buy from Ski Co. were an "input" for Highlands' Adventure Pack. Resp. Br. 20. The tickets, however, were not an input that Highlands would have transformed in any way in producing its own product or service. Ski Co. was not a wholesaler and was not in the business of selling lift tickets to other skiing firms. Highlands simply wanted to sell Ski Co.'s services in competition with Ski Co.'s own efforts to sell its own services. The Adventure Pack, therefore, adds no vertical element to this case: the relationship between Ski Co. and Highlands is purely horizontal.

a system with its competitor in another area, where circumstances were different. Highlands' argument apparently is that because Ski Co. entered into a coupon arrangement with others it had a duty to enter into one with Highlands. Thus, this fourth "activity" is merely a refusal by Ski Co. to cooperate. Ski Co. found disadvantageous (for whatever reason) and therefore refused to join in a business arrangement with Highlands of a kind that, in circumstances involving other parties, it found advantageous and did join. Under our free enterprise system—and the antitrust laws—business firms that enter into one joint venture have no legal obligation to enter into every other joint venture that may be proposed to them. Even the court below did not purport to rely on such a theory.

Finally, Highlands argues that Ski Co., when advertising its own three mountains, had a duty to advertise Highlands' as well. The very statement of the claim refutes it. Even the court of appeals did not attempt to rest the verdict on the fact that in some advertisements using a photograph of all four mountains in Aspen, Ski Co. identified only its own three mountains but not Highlands' mountain.

In sum, Highlands' dredging up of immaterial facts in an attempt to suggest that the issue of a duty to cooperate is not really presented by the case cannot obscure the plain fact that it is presented. The issue of a duty to cooperate (as reflected in the three questions stated at Pet. i) is squarely presented. The court of appeals treated it as the controlling issue, and decided the case on that basis. If *certiorari* is granted, this Court will have the same opportunity: at this stage of the case, there is no other ground for upholding or reversing the decision below.

II. The Brief In Opposition Misstates Petitioner's Position

Highlands contends that Ski Co. concedes that it had no business justification for its refusal to cooperate with Highlands. Resp. Br. 10 n.5, 24. That is incorrect. What Ski Co. concedes is that it had no business justification *other than a desire not to use its own resources to help an established competitor*. Ski Co.'s position was summed up by the trial testimony of one of its directors: "I am a businessman, and I have never understood why a businessman should help his competitor. I don't want to kill him, but I don't want to help him." Tr. 1533.

Highlands attributes to Ski Co. the position "that a refusal to cooperate could not constitute monopolization *under any circumstances*." Resp. Br. 9 (emphasis by respondent). Ski Co.'s position is, rather, that although there is a duty to deal in circumstances properly governed by the bottleneck doctrine and in certain other circumstances (*see* Pet. 6), none of those circumstances is present here.

Highlands attributes to Ski Co. the position that "for a facility to be essential it must be shown that if it were eliminated a plaintiff's entry or survival in the business would be impossible." Resp. Br. 18. Our view of the doctrine is somewhat broader than that—namely, that a facility is essential if, without it, a firm could not, as a practical matter, function in the market. See Pet. 12. The position we urge is not different in substance from that articulated in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), cited in Resp. Br. 18 and Pet. 10 n.8.

Finally, Highlands points out that a joint marketing arrangement that would allocate to it less than its fair share of the revenues would "[take] away all incentive and ability for Highlands to compete to attract customers to its mountain." Resp. Br. 5; *see also id.* 13 ("a condition that fixed Highlands' share of the revenues at a level below what skier usage at Highlands would have justified and that stifled competition between the parties"). This very argument illustrates one of the fundamental vices of a legally enforceable duty to cooperate. If the division of revenues undercompensates Highlands, it impairs Highlands' incentive to spend resources to compete; but if it undercompensates Ski Co., it impairs Ski Co.'s incentive to compete. And here the parties could not agree on a mutually acceptable division of revenue. The incentives to compete are too sensitive for judicial administraton of a duty on the part of horizontal competitors to cooperate in joint marketing to the public.

CONCLUSION

For the foregoing reasons, together with those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner
November 1984